91-905

No.

Supreme Court, U.S.
FILED
DEC 9 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Pursuant to 8 U.S.C. 1252(a)(1), the Immigration and Naturalization Service (INS) frequently retains custody of aliens under the age of 18 who are charged with being deportable, in circumstances where there is no parent, legal guardian, or other related adult available to care for the child. By regulation INS must establish a prima facie case of deportability to an examining officer within 24 hours. 8 C.F.R. 287.3. The child thereafter may seek an additional hearing before an immigration judge. 8 C.F.R. 242.2(d). If the child is not released, the regulations require INS to place the child in special alien child-care facilities until a related adult or legal guardian can be located or the deportation proceedings are concluded. The questions presented by this case are two:

1. Whether the regulations violate the substantive due process component of the Fifth Amendment, or any other provision of the Constitution, because the regulations ordinarily prohibit release of these children to unrelated adults.

2. Whether the procedures violate the Due Process Clause of the Fifth Amendment because (a) once the examining officer has determined that there is a prima facie case of deportability, INS does not hold additional hearings to determine probable cause except upon request, or because (b) INS denies release of the children to unrelated adults without conducting individualized hearings to determine whether an unrelated adult seeking custody poses a risk of harm to the child.

PARTIES TO THE PROCEEDING

Petitioners here are William P. Barr, Attorney General of the United States, Immigration and Naturalization Service, and Ben Davidian, Western Regional Commissioner of the Immigration and Naturalization Service.

Respondents in this Court are Jenny Lisette Flores, a minor, by next friend Mario Hugh Galvez-Maldonado; Dominga Hernandez-Hernandez, a minor, by next friend Jose Saul Mira; and Alma Yanira Cruz-Aldama, a minor, by next friend Herman Perililo Tanchez.

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The Solicitor General, on behalf of William P. Barr, Attorney General of the United States, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (App. 1a-69a) is reported at 942 F.2d 1352. The opinion of the panel of the court of appeals (App. 70a-144a) is reported at 934 F.2d 991.[1] The order of the district court (App. 145a-147a) is unreported.

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[1] An earlier version of the opinion of the panel of the court of appeals was reported at 913 F.2d 1315, but was superseded by the opinion reported at 934 F.2d 991.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1991. On October 30, 1991, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including December 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Habeas Corpus Clause, Article I, Section 9, Clause 2, provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

2. The Fifth Amendment provides, in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

3. 8 U.S.C. 1252(a)(1) and 1357(a)(2) are set forth in an appendix (App. 206a-207a).

4. 8 C.F.R. 242.2, 242.24, and 287.3 are set forth in an appendix (App. 207a-221a).

STATEMENT

This case involves the response of the Immigration and Naturalization Service (INS) to a difficult and frequent problem: how to care for unaccompanied alien children pending hearings on their deportability. INS has concluded that it should release such children to their parents, legal guardian, or other related adults, but if none of those persons are available, it normally should entrust their care to special child-care facilities monitored by the Department of Justice. Although the court of appeals concluded that INS's procedures satisfy applicable statutory requirements, it nevertheless held that the Constitution requires INS to release the children to unrelated adults willing to assure the children's presence at subsequent administrative hearings, except in cases where INS can demonstrate that the adults would harm the children.

1. Congress has recognized that effective enforcement of United States immigration laws necessarily requires power to arrest and detain aliens suspected of unlawful entry. Accordingly, 8 U.S.C. 1357(a)(2) authorizes INS to arrest an alien without a warrant if it has reason to believe the alien is deportable and would escape before a warrant could be obtained. Upon arrest, the statute requires that "the alien * * * shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States." INS regulations require the proceedings before the examining officer to take place "promptly, and in any event within 24 hours." 8 C.F.R. 287.3. The examining officer can continue the detention only if it finds that "there is prima facie evidence that the arrested alien is in the United States in violation of law[]." *Ibid.*[2]

Section 1252(a)(1) grants the Attorney General broad discretion to determine whether to continue the custody of the aliens detained under these provisions, to release the aliens on bonds "containing such conditions as the Attorney General may prescribe,"

[2] Title 8 also establishes procedures for arrests pursuant to warrants, but such warrants can be issued only if INS can establish probable cause to believe the alien is deportable, and only if INS already has instituted deportation proceedings before an immigration judge, as set forth in 8 C.F.R. 242.1(a), 242.2(c).

or to release the aliens on conditional parole.[3] Pursuant to regulations, the detained alien must be advised that the decision whether he will be released will be made within 24 hours. 8 C.F.R. 287.3. If INS determines to maintain custody, 8 C.F.R. 242.2 requires it to advise the alien of his rights, including his right to be represented by legal counsel of his choice (at no expense to the government), as well as the basis for his arrest, the conditions under which his release has been authorized, and his right to request a hearing before an immigration judge. 8 C.F.R. 242.2(c)(2).[4] At any time after deportation proceedings are commenced and before the deportation order becomes final, the alien may apply to an immigration judge "for release from custody or for amelioration of the conditions under which he or she may be released." 8 C.F.R. 242.2(d).

2. In response to an ever-growing multitude of deportable children found by INS without their parents or other related adults,[5] the Attorney General

[3] The statute provides:

> [A]ny such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

[4] See 8 C.F.R. 287.3 (stating that "further action [after the examining officer determines there is a prima facie case of deportability] shall be taken as provided in part 242 of this chapter").

[5] In 1990, INS took custody of 8542 children pending hearings on their deportability. Although INS did not then maintain nationwide records regarding the number of those children who were not accompanied by related adults, records from the Southern Region (principally South Texas) show that 73% of the 1317 children detained there in 1990 were unaccompanied. The University of Houston has conducted a statistical study of the 1259 children (accompanied and unaccompanied) detained in 1989 in South Texas. See N. Rodriguez & X. Urrutia-Rojas, *Undocumented and Unaccompanied: A Mental-Health Study of Unaccompanied, Immigrant Children from Central America* (1990) [hereinafter *Undocumented Children Study*] (a copy has been lodged with the Court and furnished to respondents). Of these children, about 35% were from El Salvador, 18% from Guatemala, 17% from Honduras, and 30% from Nicaragua. See *id.* table 2. The children's ages were as follows: 37% were 17 years old; 32% were 16 years old, 17% were 15 years old, and only 14% were 14 or younger. See *id.* table 3.

has exercised his authority under this statutory scheme to promulgate specific regulations governing the custody and release of alien children arrested on deportation charges. 8 U.S.C. 1252(a)(1). The regulations generally provide for release to those individuals historically recognized as appropriate custodians under state law: relatives or legal guardians.

a. First, these regulations *require* the release of children, "in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention," unless INS determines that detention is necessary to ensure presence at the deportation hearing or to ensure the safety of the child or others. 8 C.F.R. 242.24(b)(1). Second, if none of these individuals can be located other than in INS's custody, INS will evaluate simultaneous release of the child and the adult "on a discretionary case-by-case basis." Section 242.24(b)(2). Third, if the parents or legal guardians are unavailable to assume

custody because they are outside the United States or in INS detention, "the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit." Section 242.24(b)(3).

If none of these procedures leads to release, INS "[i]n unusual and compelling circumstances and in the discretion of the district director or chief patrol agent" may release the child to some other adult. 8 C.F.R. 242.24(b)(4). An unrelated adult cannot obtain custody, however, unless he "execut[es] an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings." Section 242.24(b)(3) and (4).

b. If the child is not released, he does not remain in an institutional facility. Instead, INS must make "suitable placement of the juvenile in a facility designated for the occupancy of juveniles." 8 C.F.R. 242.24(c).[6] Pursuant to an agreement reached at an earlier stage of this litigation, INS must within 72 hours place the child in a facility that meets or exceeds the detailed standards established by the Alien Minors Shelter Care Program of the Community Relations Service in the Department of Justice, 52 Fed. Reg. 15,569-15,573 (1987) [hereinafter CRS Standards] (*reprinted in* App. 152a-167a). See Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, No. 85-4544-RJK (Px) (C.D. Cal. Nov. 30, 1987) [hereinafter *Child Care Memorandum*], App. 148a-205a.[7] The program

[6] Until suitable placement is found, the juvenile "may be temporarily held * * * in any INS detention facility having separate accommodations for juveniles," 8 C.F.R. 242.24(d), where the juvenile will be housed apart from unrelated adults, unless the juvenile is in the care of a related female adult.

[7] It is important to realize that, for the great majority of the children, the total time period in INS-supervised custody is quite short. For example, of the 199 children released from INS custody in November 1991, 82% (164) had been in INS custody for less than 30 days.

is designed "to establish a network of community based shelter care programs" that can "provide a safe and appropriate environment for alien minors" during the pendency of administrative proceedings. *Id.* at 170a. Organizations seeking to provide care under the program must meet "state licensing requirements for the provision of shelter care, foster care, group care and related services to dependent children." *Id.* at 176a.[8]

The programs must provide not only for physical custody, but for family reunification services, routine and emergency medical care, comprehensive needs assesment,[9] recreation, access to religious services, and legal assistance. See CRS Standards, App. 159a; *Child Care Memorandum*, App. 180a-186a. The program requires at least on individual counseling session and at least two group counseling sessions each week. *Child Care Memorandum*, App. 181a-182a. The program also must include education "provided by a teacher certified by the State Department of Education," which must "concentrat[e] primarily on the

[8] Although the decree by its terms governs only the Western Region, INS practices throughout the country generally follow the terms of the decree.

[9] In light of the tumultuous conditions in the countries from which these children come, and the frequently traumatic circumstances of their travel to this country, one researcher has concluded that "at least 50% of the children" have "clinically significant levels" of Post-Traumatic Stress Disorder. See *Undocumented Children Study*, *supra* note 5, at 58-59. If the study's conclusions are accurate, it is particularly important that the program provide comprehensive and professional care.

development of basic academic competencies" and occur "in a structured classroom setting, Monday through Friday." *Id.* at 182a-183a. The facilities are to be operated "in a manner which is sensitive to culture, native language and the complex needs of these children." *Id.* at 173a. Finally, the facilities are to be operated "in an open type of setting without a need for extraordinary security measures." *Ibid.*

3. Respondents filed this case in 1985, claiming that INS practices with respect to detained children violate the Constitution and applicable provisions of the immigration laws. The district court granted respondents' motions for summary judgment in a brief order that justified its holding only by stating that it relied "on due process grounds." App. 146a.

The order went on to grant considerable relief to respondents. First, it invalidated the INS policy that limits release of children to unrelated adults, by requiring INS to "release any minor otherwise eligible for release on bond or recognizance to his parents, guardian, custodian, conservator, or other responsible adult party." App. 146a. The court did not permit INS to continue its practice of requiring persons to whom it releases children to agree that they would care for the children, but authorized INS only to "require from such persons a written promise to bring such minor before the appropriate officer or court." *Ibid.*

The order also invalidated the INS regulations regarding review of the detention (which, as summarized above, provide for an automatic initial examination, followed by a hearing before an immigration judge only upon request): "Any minor taken into custody shall be forthwith afforded an administrative hearing to determine probable cause for his arrest

and the need for any restrictions placed upon his release. Such hearing shall be held with or without a request by or on behalf of the minor." App. 146a.

4. A divided panel of the court of appeals reversed. App. 70a-144a.

a. Writing for two members of the panel, Chief Judge Wallace first rejected respondents' claim that the child release policy established by 8 C.F.R. 242.24 transgressed the Attorney General's broad authority to detain arrested aliens pending deportation proceedings pursuant to 8 U.S.C. 1252(a)(1). In the court's view, "the language and legislative history of section 1252(a)(1) discloses no intent to limit the Attorney General's power to detain arrested aliens." App. 83a. In particular, the court noted that the "language discloses no limitation" whatsoever "except perhaps that implied by the word 'discretion.'" *Id.* at 84a. Moreover, the majority expressly rejected respondents' contention that the Attorney General has no authority to detain aliens except to serve the purpose of ensuring their future appearance at deportation proceedings. *Id.* at 90a-91a.

b. Chief Judge Wallace then considered respondents' claim that the INS program—even if permitted by statute—contravenes substantive limitations imposed on the government by the Due Process Clause. Acknowledging the plenary control of the political branches over immigration (see App. 96a), he nevertheless concluded that "the substantive component of the due process clause does operate as some limited constraint on congressional power, though the scope of judicial review is extremely narrow." *Id.* at 100a. In his view, the regulation would be subject only to "rational basis" scrutiny, unless it infringed upon a fundamental right. *Id.* at 100a-101a.

Chief Judge Wallace then delineated the nature of the alleged fundamental right as "the right to be released to an unrelated adult," explaining that "the right at stake must be defined narrowly." App. 101a. He concluded: "Given the Constitution's assignment of the plenary political power over deportation to the legislative and executive branches, it is clear that no such right exists." *Id.* at 102a. He noted that this decision was consistent with the Court's repeated statement that the rights of children are not coextensive with those of adults. See *id.* at 105a (citing *Schall* v. *Martin*, 467 U.S. 253, 263-266 (1984) (holding that a child's liberty interest may be restricted to secure the child's welfare)).

Finally, Chief Judge Wallace concluded that the regulation survived rational-basis scrutiny, because it was rationally related to legitimate ends of the government, such as fostering the welfare and safety of the children. App. 107a-109a.

c. Chief Judge Wallace then turned to respondents' procedural due process claim. He expressed considerable confusion regarding the meaning of the district court's requirement of an "administrative hearing" that must occur "forthwith," noting that 8 C.F.R. 287.3 already requires a hearing for aliens arrested without a warrant. App. 111a-113a. Accordingly, he concluded that the hearing referred to in the order was a hearing before an immigration judge (that is, the hearing currently required upon request by 8 C.F.R. 242.2(d)). App. 112a-113a. Based on his conclusion that the protections required for pretrial detainees do not apply in civil deportation proceedings, Chief Judge Wallace reversed this portion of the order. *Id.* at 113a-117a. In his view, the procedural due process claim should have been decided by analysis of the factors outlined in *Mathews* v. *Eldridge*, 424 U.S. 319 (1975). Because the district court had not examined those factors in the first instance, the panel remanded the case to the district court for application of the *Mathews* test in the first instance. App. 117a.[10]

5. Upon rehearing en banc, the court of appeals reversed by a 7-4 vote on the constitutional issues, without questioning the panel's statutory analysis. Judge Schroeder wrote for six members of the majority.

a. Judge Schroeder first concluded (App. 12a-16a) that "aliens have a fundamental right to be free from governmental detention unless there is a determination that such detention furthers a significant governmental interest"; she explained that this right was "secured by the Constitution in its enumerated guarantee of habeas corpus." *Id.* at 16a. She also concluded that respondents' rights were not diminished by their minor status (*id.* at 16a-19a).

She then turned to the government purposes involved (App. 19a-24a). In her view, the "case is unprecedented in that it involves post-arrest detention of persons who have not been convicted of any crime, do not pose a risk of flight, and who have not been determined to present any threat of harm to themselves or to the community." *Id.* at 19a. She easily rejected INS's proffered concern for the welfare of children released to unrelated adults. First,

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[10] Judge Fletcher did not question Chief Judge Wallace's statutory analysis, but dissented (App. 118a-144a) on the constitutional issues, for reasons substantially similar to the reasons set forth in Judge Schroeder's opinion for the en banc majority, discussed below.

she reasoned that, because INS has no expertise in child welfare, INS's views were "not entitled to any deference." *Id.* at 20a. Examining the welfare concern without deference, she noted INS's reasoning that "since it is unable to do [an appropriate] evaluation [of proposed custodians], the best interests of the child must lie in detention rather than in release" to unrelated adults, but stated without further explanation that "[t]he Constitution requires the opposite conclusion." *Id.* at 21a.[11] Accordingly, she held that "INS may not determine that detention serves the best interests of [respondents] in the absence of affirmative evidence that release would place the particular child in danger of some harm." *Ibid.*[12]

Finally, Judge Schroeder considered the procedural due process claim. App. 24a-25a. She declined to determine whether the claim should be resolved

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[11] She also rejected INS's concern about potential liability for improperly releasing children, explaining that the Court held in *DeShaney* v. *Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), that a government agency would not be liable under 42 U.S.C. 1983 for harm to a child caused by a private citizen. App. 22a-23a.

[12] The seventh member of the en banc majority, Judge Rymer, concurred in part and dissented in part. App. 41a-52a. Declining to address the substantive constitutional arguments, she would have affirmed portions of the district court's judgment on procedural due process grounds based on her view that the Due Process Clause requires a prompt hearing before a neutral officer. She did not adopt the majority's substantive holding that INS must make an affirmative showing of likelihood of harm to the child, but instead held simply that INS should conduct a hearing to determine whether release was appropriate under the "unusual and compelling circumstances" standard identified in the existing regulation, 8 C.F.R. 242.24(b)(4).

under *Mathews* v. *Eldridge*, *supra*, or *Gerstein* v. *Pugh*, 420 U.S. 103 (1976), explaining that the substantive decision discussed above—which "requires that the decision to detain be made only in conjunction with a neutral and detached determination of necessity," App. 24a—required affirmance of the procedural requirements imposed by the district court under either standard. She stated that the existing procedures for a hearing before an immigration judge (see 8 C.F.R. 242.2(d)) were adequate except that (i) a hearing must be held automatically, without regard to a child's request; and (ii) the hearing must include an inquiry into whether any available unrelated adult seeking custody would represent a danger to the child. App. 25a.[13]

b. Chief Judge Wallace dissented, joined by Judges Wiggins, Brunetti, and Leavy, criticizing the en banc majority for reasons similar to the analysis set forth in his panel opinion. App. 52a-69a.

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[13] Judge Tang concurred (App. 26a-37a), generally arguing that the majority's decision could be supported not only by the Habeas Corpus Clause, but also by the substantive component of the Due Process Clause, and that application of *Mathews* v. *Eldridge* would require a hearing before an immigration judge. Judge Norris also concurred (App. 37a-41a), generally arguing that INS's policy clearly fails to provide due process.

REASONS FOR GRANTING THE PETITION

It is estimated that there are millions of illegal aliens in the United States, and thousands of them are unaccompanied minors. The Attorney General has exercised powers delegated by Congress to establish rules governing the custody and release of these children. Those rules reflect the judgment of the Attorney General that the interests of the United States and the alien children are better served by placing unaccompanied minors in the care of specialized child-care facilities designed to meet their special needs, than by releasing them to unrelated adults who are unwilling or unfit to obtain legal guardianship status under state family-law procedures. The Court of Appeals for the Ninth Circuit simply disagreed. It believed that a different policy was appropriate: INS instead should relinquish custody of an unaccompanied minor to any unrelated adult that requests the release of the child absent "affirmative evidence" that the child would be harmed while in that adult's custody. App. 21a.

The court concluded that the Constitution permitted the substitution of its view for that adopted by the agency, because the policy judgment of the Attorney General was not "entitled to any deference." App. 20a. Yet this Court has emphatically established that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976). The lower court's judgment that the Constitution forbids the regulation of that relationship at issue in this case warrants review by this Court. The decision below is based on a standard of judicial scrutiny that squarely conflicts with the principles of constitutional interpretation established by this Court, and it invalidates a program of substantial importance to the proper administration of the immigration laws.

1. The lower court's outcome rested on a faulty premise—that the policy judgment reflected in the INS regulation was not "entitled to any deference." App. 20a. This remarkable premise is in sharp conflict with this Court's decisions establishing the standard of judicial review applicable to constitutional challenges to federal policies governing aliens. In *Fiallo* v. *Bell*, 430 U.S. 787 (1977), this Court rejected an equal protection challenge to family unification policies established under the Immigration and Nationality Act, because "*special* judicial deference to congressional policy choices in the immigration context" is required. *Id.* at 793 (emphasis added).

It is clear that this "special" deference applies not only to Congress's choices, but to the Executive's exercise of delegated power under the immigration laws as well. As this Court explained in *Kleindeinst* v. *Mandel*, 408 U.S. 753 (1972), when the Executive exercises its delegated power over aliens "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification" against the constitutionally protected interests of those adversely affected. *Id.* at 770 (discussing a First Amendment claim); see also *Mathews* v. *Diaz*, 426 U.S. at 83 (rejecting constitutional challenge to immigration policy regulating benefits available to resident aliens because case presented "nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements" to achieve its goals).

Yet the lower court's decision in this case involves precisely the type of judicial second-guessing this Court has prohibited. The court did not question the legitimacy of the stated reasons for the policy—furthering the welfare of the alien children until INS locates a related adult or concludes the deportation proceedings—but found that thre were better means available to advance that goal. See App. 21a ("We therefore hold that the INS may not determine that detention serves the best interests of [respondents] in the absence of affirmative evidence that release would place the particular child in danger of some harm."). The court attempted to justify this marked departure from the governing standard of review by dismissing INS as having no special expertise in the area of child welfare. But in *Fiallo*, another case challenging family unification policies, this Court held that the "scope of judicial review" in the immigration area is not a "function of the nature of the policy choice at issue." 430 U.S. at 796. So too here. What is more, the terms and conditions of custody or release of aliens pending deportation proceedings fall squarely within the agency's statutory "responsibility for regulating the relationship" between the United States and "our alien visitors." *Mathews* v. *Diaz*, 426 U.S. at 81; 8 U.S.C. 1252(a)(1).

The Ninth Circuit's reliance on *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 114-115 (1976), is misplaced. In *Hampton*, this Court declined to afford deference to a Civil Service Commission claim that a regulation adopting a rule excluding aliens from any federal employment represented a permissible exercise of immigration policy. The Court reached this result because it was not clear that the Civil Service Commission—an agency responsible for federal em-

ployment issues—had adopted the rule in furtherance of any federal immigration responsibilities or policies. This Court indicated, however, that it would presume that a regulation was intended to further immigration policies if the "agency which promulgates the rule has direct responsibility for fostering or protecting that interest." 426 U.S. at 103. Obviously, INS is precisely such an agency; indeed, it is the *only* federal agency with *any* responsibility for caring for these children.[14]

2. The constitutional analysis adopted by the court of appeals[15] is so ambitious that it cannot even be

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[14] The decision in *Hampton* is also inapposite because it concerns *procedural* due process, not substantive due process. It is one thing to say, as this Court did in *Hampton*, that courts need not defer to an agency's resolution of policy choices beyond its competence, for purposes of telling whether the policy has been appropriately promulgated and enacted; it is an entirely different thing to say, as the court of appeals has said here, that courts need not defer to the Executive Branch's policy choices in the course of determining whether the Constitution permits the choice to be made at all. In effect, the court of appeals has relied on a decision that invalidated a policy choice because it was made by the wrong agency to justify a decision holding that the Constitution flatly forbids a policy choice.

[15] Although the opinion of the court of appeals on its face appears to grant relief under the Habeas Corpus Clause, Art. I, § 9, Cl. 2, see App. 16a, respondents' arguments throughout this litigation have been couched in terms of substantive due process, which we believe is a more appropriate rubric under this Court's precedents. In any event, the Habeas Corpus Clause is not an independent fount of substantive constitutional rights; on its face, the Clause merely requires a procedure to test whether government detentions violate *other* provisions of the Constitution. Because INS has done nothing that can be construed to suspend the privilege

reconciled with this Court's decisions rejecting challenges to laws establishing pretrial detention for citizens charged with criminal offenses. *Schall* v. *Martin*, 467 U.S. 253 (1984), and *United States* v. *Salerno*, 481 U.S. 729 (1987), establish a two-part inquiry for determining whether there is any infringement of a citizen's rights to substantive due process: (1) whether the detention serves legitimate regulatory purposes compatible with fundamental fairness; and (2) if so, whether the terms and conditions of confinement are compatible with those purposes, or whether they instead suggest that the detention is in fact based on punitive motives. *Schall*, 467 U.S. at 269-270; see *Salerno*, 481 U.S. at 747. If that inquiry is satisfied, then the court proceeds to consider whether the procedures provided to determine whether detention is appropriate satisfy procedural due process. See *Schall*, 467 U.S. at 274; *Salerno*, 481 U.S. at 746.

a. The custody here unquestionably serves legitimate regulatory purposes: fostering the welfare and safety of unaccompanied minors and the administrative interests of INS until INS can locate a related adult or conclude the deportation proceedings.[16] As

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of the writ of habeas corpus, respondents have no claim under that Clause.

[16] As the CRS Standards published in the Federal Register make clear, concern for the welfare of minors (including family reunification) was the primary purpose for implementing this program. See App. 156a-157a ("Purpose and Scope" section), 159a, 185a-186a. As noted by Chief Judge Wallace, the program also furthers the legitimate ends of ensuring appearance at future deportation proceedings, insulating the INS from liability for harm to the minors, and administrative economy. See App. 108a.

the Court explained in *Schall*, the child's interest in freedom from restraint

> must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child.

467 U.S. at 265 (citations and internal quotation marks omitted); see *Santosky* v. *Kramer*, 455 U.S. 745, 766-767 (1982) (discussing the State's *parens patriae* interest in child welfare).

In *Schall*, this Court concluded that the Due Process Clause permitted detention of children designed to further two interests: protection of society from crime, and protection of the child from the consequences of his inability to care for himself. A different conclusion is entirely unwarranted in this case, which squarely implicates the second of these two interests. The *Schall* Court plainly accepted the legitimacy of the governmental interest in retaining custody of children to care for them when parental control falters. See *Schall*, 467 U.S. at 265-266. In our view, this Court's analysis in that case, together with this country's longstanding tradition of governmental involvement in child welfare issues, compels the conclusion that detention to serve this interest is not a practice that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 268 (quot-

ing *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)).

The en banc majority's cursory dismissal of this interest (App. 20a-21a) conflicts with this Court's teaching, even outside the immigration context, that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do," *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984). At bottom, the court of appeals' decision rests on its belief that the children detained by INS generally would be better off if released to unrelated adults than if they were cared for in special child-care facilities until a relative or legal guardian can be located. But this conclusion makes sense only if one accepts the unstated premise that the Constitution forbids the government from making the substantive choice that it is generally inappropriate to release children to unrelated adults.[17] The strong tradition of government interest in child welfare, discussed in detail in *Schall* and *Santosky*, forecloses a determination that the Constitution bars such a choice, especially in a situation that involves unaccompanied alien children who in some cases may have endured significant trauma in the recent past, see note 9, *supra*.[18]

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[17] The decision of the court of appeals would place INS in a particularly difficult situation in cases where a related adult appeared to take custody of the child after the INS had released the child to an unrelated adult not under its supervision.

[18] The court of appeals' decision intrudes significantly on the important role of the States in making determinations regarding child custody. The States, of course, have carefully developed procedures for determining the qualifications of unrelated adults to care for children. See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 14:5201-14:5212, 14:5401-14:5432 (1975 & Supp. 1991); Cal. Prob. Code §§ 1510-1517 (West 1991). By preferring release to parents and guardians, the INS policy defers substantially to state-law determinations of guardianship. Although the Constitution would *permit* the federal government to make the policy choice to supplant state-court determinations on these issues by releasing children to the care of unrelated adults who have not taken the trouble to go through the appropriate state-court procedures for becoming a guardian or conservator of the child, it cannot possibly *require* that choice. Cf. *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2399-2403 (1991) (discussing the important role the States play in our federal system).

b. In *Schall* and *Salerno*, this Court proceeded to consider whether the conditions of custody were sufficiently compatible with the articulated purposes of custody to justify the conclusion that the government's decision to retain custody actually rested on that purpose, rather than an unstated desire to inflict punishment before conviction. *Schall*, 467 U.S. at 269-274; *Salerno*, 481 U.S. at 747-748. The system established in this case clearly passes this inquiry. As discussed above, see pp. 6-8, *supra*, the Community Relations Service has implemented a detailed program designed to further every significant aspect of the child's welfare. The program compares favorably with the program outlined in *Schall*, 467 U.S. at 270-271. There is little doubt that INS has developed this program to implement the articulated concern for the safety and welfare of detained children (see note 16, *supra*), and the court of appeals agreed that the INS's policy is not intended to punish them. App. 19a.

c. Finally, the available procedures would provide the requisite process under the Fifth Amendment even if respondents were citizens.[19] 8 C.F.R. 287.3 re-

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[19] This Court held in *Mathews* v. *Diaz*, *supra*, that the process due aliens under the Fifth Amendment is not co-

quires an examination within 24 hours after arrest at which the government must establish a prima facie case of deportability, thus meeting a standard even higher than the probable cause standard required to justify detention of pretrial detainees in criminal proceedings. See *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975). Moreover, before the child makes any choices about his custody, he "must in fact communicate with either a parent, adult relative, friend," or with a legal aid organization. 8 C.F.R. 242.24(g).[20] The child is then specifically advised in a language he understands (see 8 C.F.R. 242.24(h)) of the right to seek a hearing before an immigration judge under 8 C.F.R. 242.2(d), at which the child may seek "release from custody or * * * amelioration of the conditions under which he or she may be released." The immigration judge's decision, in turn, is subject to administrative review by the Board of Immigration Appeals, *ibid.*; 8 C.F.R. 3.1(b)(7), and then by the federal courts. See 8 U.S.C. 1252(a)(1).

These procedures put the child in contact with a responsible adult not affiliated with our government and entitle the child to a full administrative hearing before an immigration judge at any time he wishes to challenge the government's decision to retain custody; accordingly, they satisfy the Constitution. First, the conclusion of the court of appeals—that the government should hold a hearing to establish affirmative evidence of anticipated harm to the child in each case where an unrelated adult seeks custody—necessarily rests on the unstated premise that the Constitution bars the government's substantive conclusion that release to an unrelated adult should be disfavored and that home visits, not hearings before immigration judges, are needed to assess accurately whether an unrelated adult is fit to assume custody of a child.[21] If the Constitution permits the conclusion adopted by the agency, as we have demonstrated above, the child is adequately protected by his right to seek a hearing before the immigration judge.[22]

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extensive with that due citizens. 426 U.S. at 78. The process afforded by INS accordingly could be adequate even if the Fifth Amendment might require greater procedural protections for citizens.

[20] Juveniles from Mexico and Canada are given the option to contact an adult by phone, but by treaty communication with consular authorities is required without regard to the juvenile's wishes. See 8 C.F.R. 242.2(g), 242.24(g).

[21] If the government is entitled, as a general matter, to enact a rule of law forbidding release to unrelated adults except in unusual and exceptional circumstances, there would be no reason for a hearing to determine whether the government could prove the anticipated harm in each case, because the existence of particularized harm would be irrelevant to the determination. See *Michael H.* v. *Gerald D.*, 491 U.S. 110, 126 (1989) (plurality opinion of Scalia, J.) ("It is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration."), *id.* at 132-133 (Stevens, J., concurring) (agreeing with this proposition).

[22] We believe that the court of appeals erred in relying heavily on *Schall* v. *Martin*, *supra*, for the proposition that an individualized hearing is required in each case. Detention in *Schall* was justified only in the cases in which the juvenile was reasonably likely to commit crimes that would harm others or the child. A process implementing that justification would detain only those children reasonably likely to commit crimes; it is entirely appropriate to require individualized hearings before detaining a child based on the inherently predictive and stigmatic determination that the child would commit crimes if released. By contrast, detention is justified here by the absence of related adults to whom the child may

Second, it is difficult to understand the basis for the court of appeals' conclusion that the Constitution requires a second probable-cause determination even in the absence of a request. As discussed above, the regulations put the child in contact with a responsible adult and require that the child specifically be advised of his right to a hearing in a language he understands. 8 C.F.R. 242.2(g); 242.24(g) and (h). In light of the civil nature of deportation, see *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984),[23] and the previous determination of the examining officer on which the detention rests, we believe that the Constitution clearly permits a waiver of this hearing. Compare *Fare* v. *Michael C.*, 442 U.S. 707, 726-727 (1979) (holding that a child may waive *Miranda* rights).

3. The importance of the issues presented by this case justifies plenary review by this Court. The court of appeals has forbidden enforcement of INS policies governing unaccompanied minors on constitutional grounds. To state the obvious, Congress and the Attorney General accordingly are powerless to correct the Ninth Circuit's error. In the absence of this Court's review, the United States will be compelled to release children into the custody of unrelated adults,

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be released. There is no reason to believe that full-blown individualized hearings are necessary for INS to determine accurately whether there are in fact related adults seeking custody of the child. Moreover, the child can seek a hearing under 8 C.F.R. 242.2(d) at any time if he believes INS has erred in making that determination.

[23] See *Gerstein*, 420 U.S. at 125 n.27 (suggesting that its holding would not apply in civil cases because it was limited to the "wholly different context of the criminal justice system").

notwithstanding the obvious risks such a course poses to the children's safety and welfare.

Although the district court's order directly affects only the Western Region of INS (California, Hawaii, and Arizona), it imposes a considerable administrative burden. INS advises us that, during the 22-month period during which it complied with the district court's order pending appeal, approximately 1700 hearings (almost three a day) were held for children detained pending deportation. Nor has the problem of deportable children diminished in the interim; in 1991, INS detained 7225 alien children in the Western Region alone. Indefinite compliance with the order would require a serious diversion of resources from INS's responsibilities to administer and enforce the immigration laws.

Finally, it would serve no purpose for this Court to defer review until other circuits have had an opportunity to consider the constitutionality of the regulation at issue. The Ninth Circuit—which by itself covers a substantial portion of the operations of the Service—already has considered the issue *en banc*. In addition, the opposing modes of analysis have been fully developed in seven separate opinions, spanning 144 pages of the appendix, authored by the thirteen judges who have now considered the issues presented. We accordingly believe the issue is ripe for review by the Court at this time.

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At the heart of the court of appeals' decision is the unstated premise that the Constitution prohibits the federal government from making the substantive determination that, until the INS finds a related adult or guardian, or completes their deportation proceedings, unaccompanied alien children are better off if

they remain in child-care centers monitored by the government than if they are turned over to unrelated adults. In light of the strong tradition in this country permitting governments to intervene to protect children whenever "parental control falters," *Schall*, 467 U.S. at 265, and to entrust the formulation of policies governing aliens to the "political branches of the Federal Government," *Mathews* v. *Diaz*, 426 U.S. at 81, this far-reaching conclusion is manifestly incorrect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45193